STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 11, 2011
v	No. 273333 Lapeer Circuit Court
MATTHEW JOSEPH SOARES, Defendant-Appellant.	LC No. 05-008462-FH

ON REMAND

Before: OWENS, P.J., and O'CONNELL and TALBOT, JJ.

PER CURIAM.

This case comes to us on remand from our Supreme Court for reconsideration in light of *People v Feezel*, 486 Mich 184; 783 NW2d 67 (2010).[1] The Supreme Court held the present case in abeyance pending its decision in *Feezel*, in which the defendant driver struck and killed a pedestrian. In *Feezel*, the Supreme Court held that the trial court abused its discretion by refusing to admit evidence of the victim's "extreme intoxication," and that the error undermined the reliability of the verdict. *Id*. at 199, 203. The Court explained that when ruling on the admissibility of evidence of a victim's intoxication, courts must determine whether "a reasonable juror could view the victim's conduct as demonstrating a wanton disregard of the consequences that may ensue." *Id*. at 202. If the court concludes that no reasonable juror could so view the victim's conduct, then the proofs are insufficient to create a question of fact as to the victim's gross negligence, and the evidence of the victim's intoxication is inadmissible. *Id*. After careful examination of the lower court record, we conclude that no reasonable juror could view the victim's conduct in this case to demonstrate a wanton disregard of the consequences. Accordingly, we reverse our prior position and affirm defendant's convictions in this matter.

ISSUE

[1] *People v Soares*, ___ Mich ___; 789 NW2d 854 (2010).

In the Supreme Court remand order, Justice Markman succinctly stated the issue to be resolved on remand:

> I concur with the Court's order remanding to the Court of Appeals for reconsideration in light of *People v Feezel*, 486 Mich 184 (2010). In this case, at the time of the fatal accident, the victim was driving a motorcycle with 11-carboxy-THC in his blood. This metabolite of marijuana indicates recent ingestion of the drug. *Id.* at 210. An expert testified that the amount of the metabolite in the victim's blood suggested that his reaction time might have been slowed. Evidence was also presented that the victim was driving 9-10 miles over the speed limit. In light of these facts, the Court of Appeals should determine whether, under the standards set forth in *Feezel*, "the proofs are sufficient to make a question of fact for the jury" on the question of the victim's gross negligence. *Id.* at 196. While I share the dissent's concerns about the portion of *Feezel* that overruled *People v Derror*, 475 Mich 316 (2006), and which has created problems for law enforcement, see *People v Barkley*, ___ Mich ___ (Docket No. 139194, order entered 10/22/10), this case involves the application of legal standards articulated in *Feezel* which I supported.

FACTS, LAW AND PROCEDURAL HISTORY

Also in the Supreme Court remand order, Justice Corrigan set forth the law and facts of the present case and reached the correct result when she stated:

THE RELEVANCE OF 11-CARBOXY-THC IN THE VICTIM'S BLOOD

> The central issue in this case was not whether the defendant had a schedule 1 substance in his blood. The defendant here was intoxicated by alcohol, not marijuana, when he ran a stop sign at a high rate of speed, causing the victim's motorcycle to crash into the defendant's SUV, killing the victim. The defendant was charged with manslaughter, MCL 750.321, and operating a vehicle while intoxicated causing death, MCL 257.625(1) and (4). At issue on appeal was whether 11-carboxy-THC in the *victim's* blood was evidence admissible to prove that the victim was grossly negligent and, if so, to relieve the defendant of responsibility for proximately causing the death. Reversing the trial court, the Court of Appeals concluded that this evidence was indeed admissible. But a separate section of this Court's opinion in *Feezel*, which I joined, clearly requires us to conclude that the trial court reasonably excluded the evidence.
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> In *Feezel* we held that a victim's intoxication may be relevant to whether the victim's gross negligence was a superseding cause of his death. *Feezel*, 486 Mich at 201-202. We stressed, however, that such evidence is not relevant or admissible in all cases. *Id.* at 202. Gross negligence "means wantonness and disregard of the consequences which may ensue." *Id.* at 195 (citation omitted). "Wantonness," in turn, means"'[c]onduct indicating that the actor is aware of the risks but indifferent to the results' and usually 'suggests a greater degree of culpability than recklessness . . . .'" *Id.* at 196 (citation omitted). Mere

consumption of an intoxicating substance "does not automatically amount to a superseding cause or de facto gross negligence." *Id.* at 202. Rather, the trial court must "make a threshold determination" in each case with regard to whether gross negligence is even in issue; that is, it must determine whether "the proofs are sufficient to create a question of fact for the jury" on the question of the victim's gross negligence. *Id.* In *Feezel*, this threshold was reached because the victim's observable behavior strongly suggested gross negligence; a witness reported that, when the victim was hit by the defendant's car, the victim was walking down the middle of an unlit road, with his back to oncoming traffic, on a dark rainy night. *Id.* at 188. Indeed, the witness, who drove past the victim just before the accident, reported that she did not see the victim until he was next to her car and that she would not have been able to avoid him if he had been in her lane of the road. *Id.* at 189-190. Accordingly, evidence that the victim was *also* extremely intoxicated by alcohol was relevant to the overall question whether he was so grossly negligent that a jury could conclude that the defendant driver did not proximately cause his death. *Id.* at 199.

I cannot conclude that such threshold evidence was present here. Although the victim may have been driving his motorcycle 9 or 10 miles over the posted speed limit, no direct evidence was admitted that his behavior was otherwise erratic or dangerous, let alone that it suggested wantonness beyond recklessness with disregard of the known risks. Further, although an expert testified that the 17 nanograms per milliliter of 11-carboxy-THC in the victim's blood suggested that his reaction time might have been slowed, the expert could not attest to how intoxicated the victim was; thus the evidence did not clearly establish, as in *Feezel*, that the victim was indisputably highly intoxicated. Accordingly, the trial court did not abuse its discretion in excluding the evidence here. And, in any event, exclusion was harmless because the defendant ran a stop sign at a high rate of speed. The victim could not have avoided this accident regardless of his level of his intoxication. Thus, any intoxication could not be said to have been the superseding cause of the victim's death.

CONCLUSION

We agree with the trial court and Justice Corrigan that the victim's conduct, even if he was speeding and intoxicated to the greatest extent that the evidence the defense wished to introduce could have suggested, could not have amounted to gross negligence and thus the superseding cause of his death. We conclude that the trial court properly excluded the evidence in the present case.

We affirm defendant's convictions and sentence in this matter.

/s/ Donald S. Owens
/s/ Peter D. O'Connell
/s/ Michael J. Talbot